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IN THE
COURT OF APPEALS OF INDIANA

IN RE: THE GUARDIANSHIP OF H.J.M., a Minor Child,	)	
CONNIE ROLLINS-SNYDER,	)	
Appellant,	)	
vs.	)	No. 07A01-0605-CV-208
PATRICIA WAGERS FISHER,	)	
Appellee.	)	

APPEAL FROM THE BROWN CIRCUIT COURT
The Honorable Judith A. Stewart, Judge
Cause No. 07C01-0504-GU-4

December 28, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Connie Rollins-Snyder ("Snyder") appeals the trial court's order that granted guardianship of H.J.M. ("H.") to Patricia Fisher ("Fisher").

We affirm.

ISSUES

1. Whether the trial court erred when it granted guardianship of H. to Fisher.

2. Whether the provision of the trial court's order that limited Snyder's visitation must be reversed.

FACTS

H. was born to Carla Maxie ("Mother") on April 17, 2002. Mother suffers mental health problems that limit her ability to care for H. After observing Mother's parenting difficulties, Fisher offered to care for H., and Mother agreed. Thus, at about age 10 ½ months, H. began living with Fisher and her husband, Mr. Fisher, and the Fishers became H.'s primary caretakers. For the next two years H. lived with the Fishers, and they allowed Mother all the contact with H. that she desired. Mother would have H. for overnight visits three to four nights a month, "sometimes less." (Tr. 475). H. had occasional contact with Snyder, who is Mother's sister, when she was with Mother.

In April of 2005, Mother agreed to let Snyder care for H., and H. was taken to Snyder's home. On April 27, 2005, Snyder filed a petition for temporary guardianship of

H.[1] According to the petition, Mother's "consent" to her appointment as guardian was attached, (App. 35); however, there is no such attachment to the petition submitted in Snyder's Appendix. Further, Mother apparently notified the trial court that she revoked any such consent.[2]

During May and early June of 2005, Snyder used the Fishers as babysitters to care for H. during Snyder's work hours. Then Snyder told Fisher that they would not be able to see H. any more because Mr. Fisher had "molested H[.]." (Tr. 484).

On June 21, 2005, Fisher filed a verified motion to intervene in the guardianship action. Fisher averred that she and Mr. Fisher had been "de facto custodians of H.[] and, "at the request of" Mother, had "continuous care and possession of H[.]" for more than two years "prior to April 8, 2005." (App. 28). Fisher asserted that "because of her relationship with" H. and Mother, and "the circumstances which exist within this case," it was in the best interests of H. that Fisher be granted guardianship. *Id.*

Between June of 2005 and mid-April of 2006, the trial court held a series of hearings. Progress was affected by the fact that Mother was not represented by counsel until January of 2005. A guardian ad litem (GAL) for H. was appointed by the trial court on June 21, 2005, and a custody evaluation was also ordered. The trial court heard

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[1] In the verified petition, Snyder avers that H. has been in her care and custody "for the past thirty (30) days." (App. 26). However, there was no evidence presented indicating that Snyder had custody of H. before early April of 2005.

[2] The CCS reflects that on June 15, 2005, the trial court received a letter from Mother "requesting to retract her consent to guardianship." (App. 2). Also, the trial court expressly took judicial notice of this letter. (Tr. 507). However, no such letter is included in the materials submitted by Snyder on appeal.

evidence that Fisher was not allowed any contact with H. from late June 2005 until two court-ordered visitations after September 22, 2005, and not again until January 2006.[3] The trial court also heard various reports that law enforcement investigation into possible abuse of H. by Mr. Fisher had found no evidence thereof.

According to the CCS, on March 10, 2006, the court-ordered custody evaluation report was filed by Brenda Dewees, and the GAL report was filed by Donna Niednagel.[4] Further, the trial court expressly took judicial notice of these reports at the beginning of the final hearing. Nevertheless, these reports are not included in Snyder's Appendix. Both Dewees and Niednagel testified at the final hearing.

Dewees testified that when she asked H. about allegations of molestation, H. told her "that those things didn't happen." (Tr. 403). Dewees testified that there were "dramatic" differences between H.'s interactions with Snyder and her family and those with the Fishers. Dewees further testified that when H. was with Snyder, she observed H.'s "discontent" and a "lack of affect, lack of general happiness as a child." (Tr. 417). Dewees further testified that "H[.]'s body language, expression, affect, reciprocity in speaking" were "as different as night and day" when she was with the Fishers. (Tr. 430). Dewees opined that the Fishers were "best suited" to facilitate possible future reunification between Mother and H., and Dewees further testified that the evidence

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[3] The trial court found Snyder in contempt for her refusal to allow visitation by Fisher during the fall of 2005.

[4] The custody evaluation was described as "very comprehensive," consisting of some ten pages. (Tr. 435).

"compelled" her recommendation that Fisher be named H.'s guardian with sole care and custody of H. (Tr. 435).

At a July 2005 hearing, Niednagel testified to the "significant attachment[]" between H. and Fisher and how her removal to Snyder's care left H. "very, very confused." (Tr. 83, 86). Niednagel testified that when she observed H. waiting to visit with Fisher in January of 2006, after not having seen Fisher for months, H. repeatedly said, "I want to go see [Fisher]," and when H. "walked in the room" where Fisher was, she

> had a big smile, immediately ran to [Fisher]'s arms, sat there for several minutes, embraced and held onto her. [Fisher] attempted to at one point, and it was a good five minutes of embrace . . . tried to tell the child that she had a Christmas present for her and she wasn't interested. . . . . She continued to hold onto [Fisher].

(Tr. 269, 270). Niednagel testified that H.'s conduct "exhibited a deep attachment to [Fisher], and described H. as "clinging to [Fisher]." (Tr. 274). Niednagel had not seen "that type of bonding or clinging" by H. to Snyder. *Id.* Niednagel testified at the final hearing that she had "observed early on a difference in H.'s" interactions with Snyder and with Fisher, and that H. displayed a lot of affection and was more animated and engaged in her relationship with Fisher. (Tr. 519). Niednagel also testified that the January reunion between H. and Fisher was "one of the most meaningful, positive visitations" she had witnessed in her twenty years of child advocacy work. (Tr. 510).

The trial court announced that it would write its own findings. On January 21, 2006, the trial court issued its order appointing Fisher as H.'s guardian. The trial court found that Fisher had been "the de facto custodian for H[.] . . . from the age of

approximately ten and a half months to the age of approximately three years." (App. 19). The trial court further found that Snyder was Mother's sister, H.'s aunt, but that H. "had not resided with" Snyder for six months prior to Snyder's filing the petition for temporary guardianship, and that Snyder "had had limited contact with H[.] until April of 2004. The order further stated that the trial court had

> thoroughly reviewed the custody evaluation presented in this cause and the [GAL] reports, both of which recommend guardianship be awarded to Patricia Fisher. The Court has taken into consideration the observations of the custody evaluator and the [GAL] noting significant differences between H[.]'s behavior when she is with the Fishers and when she is with . . . Snyder.

(App. 19). The trial court expressly found that Snyder loved H., but "considering all of the evidence," it found that "placing guardianship with Fisher" was "in H[s.]'s best interest." (App. 20). The trial court's order acknowledged that allegations had been made about sexual molestation of H. by Mr. Fisher, noted the investigation and consideration of such allegations by the custody evaluator and GAL, and found "no evidence that the child is in any way at risk when she is with the Fishers." (App. 20). The trial court further found that placement with Fisher would best facilitate H.'s continuing relationship with Mother. Finally, the trial court found the "best interests of H[.]" required "that certain restrictions or limitation be placed" on Fisher's guardianship. (App. 21). One such restriction was that

> [b]ecause of the animosity involved in this cause, and based on the recommendations of the [GAL] and custody evaluator, there shall be some period of time in which H[.] shall be allowed to transition back into her life with the Fishers without visitation from [Snyder or her husband]. However, rather than setting a lengthy period of time, the Court simply requires there be no visitation or contact for a period of thirty (30) days,

> and that contact and visitation may occur thereafter if recommended that it is in H[.]'s best interests by her counselor . . . . Then contact shall occur as agreed between . . . Snyder and . . . Fisher upon recommendation of [the counselor].

(App. 21-22). The trial court then ordered that Fisher be appointed guardian of H.

DECISION

1. Appointment of Fisher as Guardian

The trial court's determination of whom to appoint as guardian for a minor is a matter "within the sound discretion of trial courts, and their judgments must be afforded deferential review." *Hinkley v. Chapman*, 817 N.E.2d 1288, 1293 (Ind. Ct. App. 2004) (quoting *In re Guardianship of B.H.*, 770 N.E.2d 283, 287 (Ind. 2002)). We will reverse the trial court's judgment when there is no evidence to support the findings or the findings do not support the judgment. *Id.* Upon appellate review, we consider "only the probative evidence and reasonable inferences supporting the judgment," and we do not weigh the evidence or assess witness credibility. *Id.*

Snyder first argues that the award of guardianship to Fisher was "against H[.]'s best interests." Snyder's Br. at 2. Snyder cites extensively to her own testimony; however, we consider the evidence most favorable to the trial court's decision. *Hinkley*, 817 N.E.2d at 1293. Snyder also claims that H.'s counselor "said it would be harmful to move H[.] out of [Snyder]'s home." *Id.* at 4. The counselor had never met H. until August of 2005, more than four months after she had been removed from Fisher's custody and after she had been kept totally from any contact with Fisher for two months. Further, when the counselor was expressly asked whether "based upon [her] professional

opinion," it would "be harmful and disruptive" to remove H. from Snyder's custody, the counselor declined to agree that such a move would be harmful. (Tr. 379). Rather the counselor answered that she "s[aw] no reason to move her"; she did not testify that it would be harmful or disruptive to H. if she were moved. Snyder also asserts that the trial court failed to give due regard to Snyder's concerns about possible sexual molestation of H. The trial court heard extensive testimony about the investigation of such allegations and the lack of evidence to support them, as well as the opinions of both the custody evaluator and the GAL that H.'s behavior did not reflect that such had occurred. Snyder's initial argument simply asks that we reweigh the evidence, and this we do not do. *See Hinkley*, 817 N.E.2d at 1293.

Snyder next argues that the trial court "misapprehended" an applicable statute. Snyder's Br. at 8. The statute provides that "any person related to an incapacitated person by blood or marriage with whom the incapacitated person has resided for more than six (6) months before the filing of the petition" is a person "entitled to consideration for appointment as a guardian under section 4 of this chapter." Ind. Code § 39-3-5-5. According to Snyder, the trial court's finding that H. had not resided with her for the statutory six months was erroneous because it cited the date that Snyder filed the petition for temporary guardianship, and the trial court should have used the date in November of 2005 that Fisher filed a motion asking for a hearing "for final issues." (App. 8). We do not find this argument persuasive. Further, even if the statute applies based upon the fact that H. had been residing with Snyder for six months before Fisher sought a final resolution of the guardianship matter, what the statute provides is that a person in

Snyder's position – *i.e.*, a sister to the child's mother, the child's aunt – "is entitled to consideration for appointment as a guardian." I.C. § 29-3-5-5. It is indisputable that the trial court did consider appointing Snyder. Moreover, such "consideration is for appointment as a guardian under section 4," *id.*, and section 4 further states that the trial court "shall appoint as guardian a qualified person . . . most suitable and willing to serve, having due regard to . . . the best interest of the . . . minor." I.C. § 29-3-5-4. The trial court considered both Snyder and Fisher, considered the best interest of H., and found Fisher most suitable to serve.

Next, Snyder argues that the trial court "misapplied" section of 4 of the statute, which requires the trial court to give "due regard" to "the relationship of the proposed guardian to the individual for whom guardianship is sought." Snyder's Br. at 11, I.C. § 29-3-5-4(5). Snyder asserts that "the trial court did not give enough consideration to this element." Snyder's Br. at 11. Again, she asks that we reweigh the evidence, and this we cannot do. *See Hinkley*, 817 N.E.2d at 1293.

Lastly, Snyder asserts that the trial court's guardianship order should be reversed because it abused its discretion by admitting into evidence an audiotape played at the contempt hearing on July 21, 2005.[5] Snyder claims that "the tape is clearly unreliable." Snyder's Br. at 13. Snyder did not make such an objection to the trial court. Snyder objected that the audiotape – made by Fisher of "conversation with [Snyder] dropping off H[.] and picking her up" – lacked "been proper foundation." (Tr. 140, 141). The trial

[5] The audiotape is not included on the materials submitted by Snyder on appeal.

court noted that Fisher had "identified it as the tape she made." (Tr. 142). Snyder then withdrew the objection. *Id.* Accordingly, Snyder's appellate argument is that the admission of the tape constituted fundamental error – a clearly blatant violation of basic and elementary principles, with the harm or potential for harm therefrom being substantial and appearing clearly and prospectively. *S.M. v. Elkhart County Ofc. of Family & Children*, 706 N.E.2d 596, 600 (Ind. Ct. App. 1999). Inasmuch as we do not have the audiotape to review, and Snyder herself states that "it was impossible to ascertain what exactly occurred on the recording," Snyder's Br. at 15, we cannot conclude that the playing of this audiotape constituted fundamental error warranting reversal of the trial court's order.

2. Visitation

As a second issue, Snyder argues that "the trial court . . . erred by prohibiting [Snyder] from having any visitation with H[.]." Snyder's Br. at 15. She mischaracterizes the trial court's order. As set out more fully above, "based on the recommendations" of the GAL and the custody evaluator, the trial court ordered that when H. was initially transferred to Fisher's custody, there be a thirty day period of "no visitation or contact" in order that H. "be allowed to transition back into her life with the Fishers." (App. 21). Thus, the trial court did not prohibit all visitation by Snyder with H. Further, the trial court ordered that such visitation between Snyder and H. could "occur thereafter" based upon the recommendation of H.'s counselor. *Id.*

A trial court's determination of visitation will be reviewed only for an abuse of discretion. *Lasater v. Lasater*, 809 N.E.2d 380, 400 (Ind. Ct. App. 2004). No abuse of

discretion will be found "if there is a rational basis in the record supporting the trial court's determination." *Id.* The trial court explained its reason for precluding visitation by Snyder with H. for the initial thirty days. Thereafter, visitation may proceed if so recommended by H.'s counselor. Snyder's reply brief asserts that the trial court "should allow H[.] at least to see [Snyder] by reasonable visitation." Reply at 4. Because the trial court authorized future visitation as recommended by H.'s counselor, it seems more than likely that Snyder was indeed allowed reasonable visitation after the initial thirty-day transition period. Based upon the evidence before the trial court, the trial court's order as to visitation is not an abuse of the discretion.

Affirmed.

BAKER, J., and ROBB, J., concur.